IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	**CRIMINAL ACTION NO. 09-806**
v.	:	
	:	**CIVIL ACTION NO. 13-3325**
DWAYNE PARKER,	:	
Defendant	:	

MEMORANDUM OPINION

RUFE, J. **AUGUST 11, 2014**

On December 17, 2009, Defendant Dwayne Parker was indicted of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He pleaded not guilty and filed a motion to suppress physical evidence, which this Court denied. He then changed his plea to guilty, reserving his right to appeal the Court's suppression decision. The Third Circuit affirmed this Court's ruling no the suppression motion, and this Motion to Vacate, Set Aside, or Correct a Sentence pursuant to 28 U.S.C. § 2255 followed.

I. Factual Background

The facts of this case were concisely set out in the Third Circuit's opinion on Parker's appeal of the suppression motion:

> Around 4 a.m. on October 22, 2009, after receiving an anonymous 911 call, Philadelphia police dispatch issued two radio calls one minute apart reporting a robbery in progress and a person with a gun. The two calls stated the robbery was occurring at 300 West Glenwood Avenue, which the police regard as mid-level crime area, and identified the robbers as black males driving a silver Cadillac. Within one minute of receiving the calls, Officers Lewis and Binns arrived at 300 West Glenwood Avenue, where they spotted a silver Cadillac Escalade SUV turn left from Third Street. The officers could not determine how many people were in the car because of its tinted windows. There was no other traffic in the area. When Lewis and Binns pulled behind the Cadillac in their marked patrol car with their overhead lights off, it double-parked in front of the gate of a closed auto garage. Based on his experience, Lewis believed this action might be an avoidance tactic to prevent the police from running the license plate or to avoid attention by allowing the police to drive by. Lewis and Binns pulled behind the Cadillac and turned on their overhead lights; other officers also arrived at the scene.

> While approaching the vehicle, Lewis and Binns observed Dwayne Parker, one of the five men in the car, reaching and looking downward and making sudden movements. After the men were removed from the car, Lewis looked inside the vehicle and spotted a firearm on the floor where Parker had been seated. Parker was arrested for weapons violations. He was later indicted with a count of felon-in-possession of a firearm, 18 U.S.C. § 922(g), and taken into federal custody. After being advised of his *Miranda* rights, he admitted possession of the gun.[1]

II. Parker's Claims

Guilty pleas significantly curtail the range of claims that a criminal defendant can raise under a § 2255 motion. One cognizable issue is ineffective assistance of counsel. These claims may properly be raised in a motion for collateral relief rather than on direct appeal, and Parker has raised several allegations of ineffective assistance.[2]

On his form § 2255 motion, Parker argues that counsel was ineffective for: (1) failing to "challenge the reasonableness and intrusiveness of the investigation following the stop";[3] (2) failing to use certain evidence obtained in discovery that would have exposed perjury by the police offers who testified at the suppression hearing;[4] (3) failing to "investigate all the facts surrounding the case against the defendant"[5]; and (4) failing to object to the Court's imposing a sentence on Defendant pursuant to the Armed Career Criminal Act ("ACCA").[6] In a brief

---

[1] *United States v. Parker*, 467 F. App'x 120, 121 (3d Cir. 2012) (footnotes omitted).

[2] *Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."). On his form § 2255 petition, Parker indicated that he did not raise these issues on appeal because of the ineffectiveness of his appellate counsel. Read liberally, he could be alleging a fifth ground for relief, namely, ineffective assistance of appellate counsel. Because Parker posits that appellate counsel was ineffective only in failing to raise arguments related to trial counsel's alleged ineffectiveness, and since it is not ineffective to fail to make losing arguments, *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996), any ineffective-assistance-of-appellate counsel claim fails for the same reason that Parker's ineffective-assistance-of-trial counsel claims fail.

[3] Doc. No. 59 at 4.

[4] *Id.* at 5.

[5] *Id.* at 7.

[6] *Id.* at 8.

attached to the form motion, Parker argues what could be construed as three additional grounds for relief: (5) that counsel was ineffective for failing to investigate and cross-examine police officers "concerning the true facts of the reason for the actual stopping of the car";[7] (6) that his predicate guilty pleas (or his guilty plea in this Court) were not knowing, intelligent, and voluntary;[8] and (7) that this Court erred in its determination that the law required Parker to be sentenced pursuant to the ACCA.[9]

Because some of these grounds are related, the Court will organize its discussion by addressing the issues grouped together in the following order: claims related to the stop and search of the car (grounds (1) and (5)); ACCA issues (grounds (4) and (7)); counsel's failure to investigate and cross examine witnesses at the suppression hearing (grounds (2) and (3)); and the voluntariness of Parker's pleas (ground (6)).

III. Governing Law

The Sixth Amendment guarantees not only that all criminal defendants are entitled to counsel, but also that their counsel will be effective.[10] In order to make out a claim of ineffective assistance, "the defendant must show that counsel's performance was deficient," meaning "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."[11] It is not ineffective for counsel to decline to make

[7] *Id.* at 14.

[8] *Id.* at 16.

[9] *Id.* at 18. As *pro se* filings must be construed liberally, this Court will consider the material in the brief both as potential independent grounds for relief and as arguments in support of the grounds alleged in the form motion where appropriate.

[10] *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970).

[11] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

arguments that would have lacked merit, because to prevail on a *Strickland* claim, "a defendant alleging ineffective assistance of counsel must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[12]

IV. Discussion

A. Stop and Search of the Car

In his form motion, Parker asserts that counsel was ineffective for failing to challenge the reasonableness of the search separately from the reasonableness of the stop. This argument fails for two reasons: first, Parker's counsel did challenge the reasonableness of the search,[13] and second, her arguments related to the search were less extensive than her arguments related to the stop because the latter were stronger. Although this Court and the Third Circuit ultimately concluded that the stop was reasonable, Parker's counsel performed admirably in trying to make that question as close as possible by stressing the absence of certain details in the 911 call, the fact that the call was later determined to be unfounded, and the possibility of an innocent explanation for the driver's decision to pull the car over.[14] Once the stop was made, though, the subsequent search (assuming the stop was constitutional) was clearly permitted: there were five men on the sidewalk, steps away from the car which the police reasonably concluded, based on the references to a gun in the radio calls and on two passengers' furtive movements, could have contained firearms that endangered the officers.[15] Defense counsel made a tactical decision to

[12] *United States v. Jiminez*, 54 F. App'x 369, 371 (3d Cir. 2002) (internal quotation marks omitted).

[13] Suppression Hr'g Tr., 207:19–211:6 (Sept. 8, 2010).

[14] *E.g., id.* at 43:14–24; 113:24–117:9.

[15] *Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

attack the weakest part of the prosecution's argument, and her ultimate failure was due to the facts and the law, not to inadequate performance.

Parker also argues that his suppression hearing counsel was ineffective for failing to cross-examine police officers effectively on the subject of why they stopped the car Parker was found in. He relies heavily on a Computer-Assisted Dispatch ("CAD") report that he argues demonstrates that "there was no evidence of a call for a robbery in progress."[16] It is true that the CAD report classifies the incident as "person with a gun" rather than "robbery in progress," but from the face of the document it is clear that the report is a highly truncated summary of the events of October 22, 2009. Moreover, five police officers credibly testified at the suppression hearing that there was a radio call for a robbery in progress, so it was not ineffective for Parker's counsel to decline to cross-examine the officers on that point with this abbreviated document. Counsel could well have determined that confronting witness with the CAD report would have only underscored their firm recollection that there was a report of a robbery in progress, undermining her client.

B. ACCA

Parker contends that his counsel was ineffective for failing to object to the imposition of a sentence pursuant to the Armed Career Criminal Act ("ACCA"). He also argues that this Court erred in sentencing him pursuant to that act.

The ACCA provides that "In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title

[16] Doc. No. 59 at 15.

and imprisoned not less than fifteen years."[17] "Serious drug offense" is defined as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law."[18] A "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of"[19] 21 U.S.C. ch. 13, subchapter I. The schedules referred to include cocaine as a controlled substance.[20]

Parker was convicted of three separate violations of 35 Pa. Cons. Stat. Ann. 780-113(a)(30), which prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." In order to determine whether a particular "controlled substance" under state law is a substance contained in the federal controlled substance schedules, a federal court may examine "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[21]

Initially, at his sentencing, Parker's counsel objected that the certified records of Parker's predicate convictions did not disclose what controlled substance he was found guilty of having possessed. If one of his convictions was for possession of a controlled substance that did not carry a ten-year maximum sentence,[22] he would not qualify for the ACCA's mandatory

[17] 18 U.S.C. § 924(e)(1).

[18] *Id.* § 924(e)(2)(A)(ii).

[19] 21 U.S.C. § 802(6).

[20] *Id.* § 812(a)(4).

[21] *Shepard v. United States*, 544 U.S. 13, 16 (2005); *United States v. Tucker*, 703 F.3d 205, 215 (3d Cir. 2012).

[22] *E.g.*, 35 Pa. Cons. Stat. Ann. § 780-113(f)(3).

minimum. However, immediately after defense counsel began her argument, it became clear that the Government had failed to copy the pages of the certified charging document that specified the drug in the predicate convictions (cocaine, a schedule II drug).[23] After she was alerted to the mistake, defense counsel inspected the certified records and concluded that there was no escape from the requirements of the ACCA. Because defense counsel was correct in her conclusion, it was not ineffective for her to abandon the frivolous objection that Parker was not subject to the ACCA.

Parker devotes a great deal of his brief to arguing that various approaches to determining the character of a prior felony would not qualify him for the ACCA. It is not necessary to address each of his arguments. Courts in the Third Circuit follow what is known as the "modified categorical approach," which allows consideration of the charging document, which in Parker's predicate felonies all explicitly demonstrate that his drug crimes involved cocaine base. Because it is obvious that he qualifies for the mandatory minimum sentence that the act requires, this Court did not err, and any objection by counsel would have been frivolous.

C. Counsel's Performance Before and at the Suppression Hearing

Parker argues in his petition that "counsel should have used the so called statements of facts by the Government's witness along with their evidence from the discovery to argue against the perjured testimonies giv[en] by the police officers during the suppression hearing."[24] He also states that "counsel failed to investigate all the facts surrounding the case against the defendant. The defendant pleaded with counsel to retrieve certain evidence in support of the defendant. Counsel also failed to successfully protect the defendant's fourth & fifth amendments from being

[23] Sentencing Hr'g Tr. 7:17–9:2 (Dec. 10, 2010); Doc. Nos. 51, 52 & 53

[24] Doc. No. 59 at 5.

violated."[25] If these allegations refer to other aspects of counsel's performance than those discussed above with respect to the seizure and search of the Cadillac, they are insufficient to entitle Parker to relief. They do not specify what steps counsel should have taken or how counsel's performance prejudiced Parker.

D. Intelligent and Voluntary Guilty Plea

Parker objects that his guilty pleas in Pennsylvania courts were not knowing and voluntary because he was not advised that they would expose him to a mandatory minimum sentence.[26] His argument appears to attack his prior convictions on the grounds that his state convictions violated the rule in *Boykin v. Alabama* that a guilty plea is not knowing, voluntary, and intelligent if a court fails to inform the defendant of a mandatory minimum sentence.[27] He could also be understood to argue that the state court did not inform him that his guilty plea could later expose him (if he committed another crime) to sentencing in federal court under the ACCA. In either event, the Supreme Court has clearly held that the ACCA does not permit collateral attacks on predicate state-court offenses on any basis other than a *Gideon* violation, and therefore his challenges based on his Pennsylvania guilty pleas are not cognizable.[28]

If Parker contends that his guilty plea in this case was not knowing, intelligent, and voluntary, he fails to persuade. Parker signed a guilty plea agreement that stated that he faced a 15-year mandatory minimum sentence.[29] At the Court's guilty plea colloquy, the plea agreement

[25] *Id.* at 7.

[26] *Id.* at 16.

[27] 395 U.S. 238 (1969).

[28] *Custis v. United States*, 511 U.S. 485, 487 (1994).

[29] Doc. No. 37 at 2, ¶ 5 ("The defendant understands, agrees and has had explained to him by counsel that for a conviction under 18 U.S.C. § 922(g)(1) the Court may impose the following statutory maximum and mandatory minimum sentence for this Class A felony, when, as here, the defendant has three prior convictions for

and its terms, including the penalties Parker faced, were addressed and acknowledged.[30] Parker acknowledged his lawyer had fully explained the agreement to him and he understood everything he agreed to.[31] Finally, at Parker's sentencing hearing, the following colloquy occurred:

> THE COURT: I know you accepted responsibility, even though there's preservation of your right to appeal a legal ruling here, you are still accepting responsibility, and the consequences for you are enormous. You face a fifteen year mandatory minimum term here.
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: More time than you have ever spent in jail, but you have spent time in jail.
>
> THE DEFENDANT: Yeah.[32]

Although there is some evidence that Parker's attorney did not realize the Government could produce at the sentencing hearing the charging instrument that made clear Parker's status as an armed career criminal,[33] there is no evidence whatsoever to suggest that Parker and his attorney did not realize that he in fact so qualified. The record does not reflect that Parker was surprised by the contents of the charging instruments nor that he attempted to withdraw his guilty plea when it became clear that the Government could easily establish his eligibility for armed career criminal status. The record reflects that Parker's guilty plea was knowing, voluntary, and intelligent, and any challenge on that basis to his prior guilty pleas is not cognizable.

V. Conclusion

For the foregoing reasons, Parker's motion will be denied. An appropriate Order follows.

---

serious drug offenses, which qualify him as an armed career criminal under 18 U.S..C § 924(e): a term of imprisonment of not less than 15 years . . . .").

[30] Change of Plea Hr'g tr. 11:1–14:25.

[31] Change of Plea Hr'g tr. 9:21–24, 10:12–14.

[32] Sentencing Hr'g Tr., 10:19–11:3 (Dec. 10, 2010).

[33] *Id.* at 6:9–9:2.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	**:**	
	:	**CRIMINAL ACTION NO. 09-806**
v.	**:**	
	:	**CIVIL ACTION NO. 13-3325**
DWAYNE PARKER,	**:**	
Defendant	**:**	

ORDER

AND NOW, this 11th day of August 2014, upon consideration of Defendant's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 59), the briefing in support thereof, and the response thereto, it is hereby **ORDERED** that for the reasons set forth in the accompanying Memorandum Opinion the motion is **DISMISSED**. No certificate of appealability shall issue, and no evidentiary hearing shall be held.

The Clerk of the Court is **DIRECTED** to **CLOSE** this case.

IT IS SO ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.